Heritage Hall, E.P.I. Corporation *and* Kentucky Laborers District Council, Laborers International Union of North America, Local No. 575, AFL–CIO *and* Richard T. Beck. Cases 9–CA–33459–1–3–4–5, 9–CA–33522, and 9–CA–33658

March 6, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On April 30, 1997, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the Charging Party filed a brief in response to the Respondent's exceptions and brief, and a motion to strike.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified below[4] and to adopt the recommended Order as modified.[5]

1. We agree with the judge that the Respondent's licensed practical nurses (LPNs) are not statutory supervisors. Section 2(11) of the Act defines "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Because this provision is to be read in the disjunctive, any of these enumerated powers is sufficient to confer supervisory status.[6] As the Supreme Court stated in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–574 (1994):

> [T]he statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have the authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer"?[7]

The Board has long held that the burden of establishing the LPNs' supervisory status, however, rests on the Respondent as the party asserting supervisory status.[8] Further, the Respondent's job description for the LPNs, stating in part that the LPNs "supervise" nursing assistants (NAs), is not dispositive of their status. It is well settled that employees cannot be transformed into statu-

[1] The Respondent has requested oral argument and the Charging Party has filed a response to the request. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has attached to the brief supporting its exceptions an order of the Kentucky Unemployment Insurance Commission, which was decided after the close of the hearing in this case. Because the Respondent has never sought to include this order in the record, we grant the Charging Party's motion to strike that attachment from the Respondent's brief as it does not constitute record evidence as defined by Sec. 102.45(b) of the Board's Rules and Regulations.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Although the judge found that Alice Fink, the Respondent's director of nursing, had unlawfully threatened, inter alia, the unit employees with the loss of holiday and vacation pay, he did not set forth any evidence to support finding this 8(a)(1) violation. We find it unnecessary to pass on this allegation as it is cumulative in light of the judge's additional finding, fully supported by the evidence, that the Respondent's Supervisor Linda Pilkington threatened an employee with the same reprisals.

Regarding the judge's finding that the Respondent violated Section 8(a)(1) by conducting its own election after the Union filed the initial unfair labor practice charge here blocking the Board election, we stress that under *Struksnes Construction Co.*, 165 NLRB 1062 (1967), the Respondent was prohibited from lawfully conducting its own election while the Union's election petition was pending even if the Respondent had complied with the procedural safeguards set forth in that case. Id. at 1063.

[5] In accordance with *Excel Container, Inc.,* 325 NLRB 17 (1997), we shall change the date in par. 2(e) of the judge's recommended Order from December 7, 1996, to October 1, 1995, the approximate date of the first unfair labor practice.

[6] *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 273 (1st Cir. 1997); *Providence Hospital*, 320 NLRB 717, 725 (1996), enfd. sub. nom. *Providence Alaska Medical Center v. NLRB,* 121 F.3d 548 (9th Cir. 1997).

[7] See *Schnurmacher Nursing Home v. NLRB,* 214 F.3d 260, 264 (2d Cir. 2000), where the court noted that the third requirement was, as here, not in issue because the Court in *Health Care & Retirement Corp.,* supra at 579–580, held that a nurse's authority to direct less-skilled employees is exercised 'in the interest of the employer' rather than solely in the interests of patients.

[8] *Beverly Enterprises-Pennsylvania v. NLRB,* 129 F.3d 1269, 1270 (D.C. Cir. 1997); *Tucson Gas & Electric Co.,* 241 NLRB 181 (1979). We recognize that this case arises in the Sixth Circuit, and that the Sixth Circuit Court of Appeals has disagreed with the Board on the issue of which party has the burden of proof in establishing supervisory status, and with the Board's interpretation of the term "independent judgment" in Sec. 2(11). We note, however, that the Supreme Court has recently granted certiorari in the case of *Kentucky River Community Care v. NLRB,* 193 F.3d 444 (6th Cir. 1999), cert. granted 121 S.Ct. 27 (2000), a case which raises these issues.

tory supervisors merely by vesting them with the title or job description of supervisor.[9]

The Respondent operates a nursing home in Lawrenceberg, Kentucky. Top managers are Administrator Jennifer Steer, Director of Nursing Alice Fink, and Assistant Director of Nursing Julie Bibb Reynolds, who are all present at the facility from 8 a.m. until 5 p.m. The Respondent operates skilled care, personal care, and intermediate care units. During the Respondent's daily three-shift operation, one registered nurse (RN) is usually assigned to the skilled care unit along with two nurses' assistants (NAs) and one certified medication aide (CMA) for each of the three shifts (except no CMA works the third shift); the personal care unit is staffed by one nurse (RN or LPN), one or two NAs and one CMA on the first two shifts, with one nurse (RN or LPN) and one NA on the third shift; and the intermediate care unit is staffed by one nurse (RN or LPN), one CMA and three to four NAs on the first two shifts, with one nurse (RN or LPN) and two or three NAs on the third shift. The Respondent has two charge nurses (CNs) who are responsible for the day and evening shifts,[10] while the night shift and weekend shifts operate without a charge nurse. When necessary, the CN is available at home to receive calls for directions from the nurse on duty during weekends and night shifts. The NAs work on a schedule that nursing assistant Pointer prepares and they perform patient care duties according to a daily list of work assignments made by Reynolds.

Although the union's election petition sought a unit that included the Respondent's LPNs, the parties later entered into a stipulation to conduct an election in a unit that excluded the LPNs.[11] The unfair labor practice charges that the Union subsequently filed blocked that election. The supervisory or employee status of the LPNs must be determined to decide whether or not the LPNs were statutory employees who were subjected to unfair labor practices.

The Respondent contends that the LPNs possess three statutory indicia of supervisory status: they assign work to, responsibly direct, and discipline NAs.

Assignment: The record fails to establish that the LPNs' assignment authority over the NAs is anything more than routine in nature. NA Terry Pointer prepares the work schedules for NAs working the first two shifts according to the daily list of work assignments done by Assistant Director of Nursing Reynolds.

As LPN Tyler testified:

> We have a ledger book that stayed at the blue nurse's station. . . . [W]e go to the ledger book for the nursing assistants that Terrie Pointer has made out, and she had assigned . . . which nursing assistant's there, what hall they're working, and we just put it down on our paper so we know for our own reference who's working with us.[12]

There is no showing that even on the third shift and weekends the LPNs' role in assigning work requires the exercise of any independent judgment. Although LPNs may call substitute employees if NAs are absent from work, they have no authority to require or order off-duty employees to fill a particular shift. The LPNs simply request volunteers to fill the vacancy on the shift. As the Eighth Circuit stated in *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1047 (1998), "seeking off-duty volunteers to help out when the facility is short handed" is insufficient to confer supervisory status. Therefore, we find that the LPNs' assignment of the NAs' work "falls short of the supervisory authority to assign contemplated by Section 2(11)." Id.[13]

Responsible Direction: Contrary to the Respondent's assertion, we conclude that the record is insufficient to establish that the LPNs responsibly direct the work performed by NAs. The judge found that, rather than receiving responsible instruction from an LPN, NAs "approach an LPN or an RN and make a request for their assistance or guidance."[14] Tyler, as noted, testified that tasks are usually determined according to a list prepared by Reynolds. As the First Circuit commented in *Telemundo*, 113 F.3d at 274, "the mere fact that an employee gives other employees instructions from time to time does not in and of itself render him [or her] a supervisor under the Act." Here, the NAs' jobs, as the judge stressed, require little training and skill.[15] For these reasons, we find that the LPNs' direction of NAs' work is a routine activity and thus does not require the exercise of

[9] *Schnurmacher Nursing Home v. NLRB*, 214 F.3d at 266; *T.K. Harvin & Sons*, 316 NLRB 510, 530 (1995).

[10] The parties have agreed that the two registered nurses (RNs) who act as CNs are statutory supervisors.

[11] The unit consists of "[a]ll hourly employees, including janitors, housekeepers, nurses aides, dietary employees, maintenance employees, and laundry workers, employed by the Employer at its Lawrenceburg, Kentucky facility . . . , [excluding] [a]ll office clerical employees, registered nurses, licensed practical nurses, professional employees, guards and supervisors as defined in the Act."

[12] Judge's decision: sec. II, par. 8.

[13] See *Ten Broeck Commons*, 320 NLRB 806, 809–812 (1996) (authority to assign limited by mandatory staffing schedule).

[14] Judge's decision: sec. II, par. 9.

[15] Although the NAs' job description is not in evidence, Tyler testified that the job duties of a nursing assistant consisted of: "[giving] showers, whirlpools, hands-on care with oral care, . . . bathing them, washing their hair, feeding them, getting them up, getting them dressed, laying them back down for naps, passing ice, [and] making the beds up."

independent judgment so as to warrant a finding of supervisory status.[16]

Discipline: There is no showing that any verbal counselings and written reprimands issued by the LPNs have an adverse impact on the employees' employment status. LPN Barbara Gail Tyler testified that she issued only two written warnings to NAs and that she then put them under the door of Director of Nursing Fink's office for further investigation by Fink. The record is silent regarding any subsequent developments with respect to the warnings, including whether the warnings were placed in the employees' personnel files**.** Essentially reportorial authority is insufficient to confer Section 2(11) status.[17] Moreover, LPN Gerri Wilson testified that she was unaware that she possessed disciplinary authority until the Respondent told her to discipline any NAs who gathered to discuss the Union.[18] We also note that the LPNs' authority to send NAs home early for gross misconduct is routine in nature and that Reynolds could recall only one instance in which a nurse had done so.[19] Thus, we find the record insufficient to establish that the LPNs can discipline or effectively recommend the discipline of the Respondent's NAs.

Accordingly, we conclude that the Respondent has not met its burden of showing that its LPNs are supervisors outside the protections of the Act.

2. The judge found that the Respondent violated Section 8(a)(1) of the Act when its administrator, Jennifer Steer, informed the LPNs that they were supervisors and unable to vote in the election or engage in union activities. The evidence shows, however, that although Steer and the Respondent's other officials and agents told the LPNs that they could not vote in the election**,** they did not state that they could not engage in union activities**.** Because the parties had stipulated to a bargaining unit that excluded the LPNs, it is clear that Steer and the others, in making these statements, accurately informed the LPNs of their voting status. Although the comment that the LPNs were excluded by reason of supervisory status was incorrect, it did not constitute interference with the LPNs' Section 7 rights. We therefore reverse the judge and find that the Respondent did not act unlawfully in violation of Section 8(a)(1) through Steer's statements. Accordingly, we dismiss this allegation of the complaint.

3. In adopting the judge's finding that the Respondent unlawfully discharged employee Tyler on December 6, 1995,[20] we conclude that, although the Respondent asserted other reasons for her discharge, the Respondent terminated Tyler because she refused to support its antiunion campaign and to commit unfair labor practices in furtherance of the Respondent's cause. Indeed, as the judge found, Director of Nursing Fink told Tyler at the time of her discharge, "If you don't have enough backbone to support EPI [the Respondent], then you don't need to be employed here anyway." The Respondent subjected Tyler to numerous unfair labor practices as it solicited her support for its antiunion campaign. Thus, the judge found, and we agree, that the Respondent violated Section 8(a)(1) by threatening Tyler with discharge and the facility's closure, by interrogating her, by identifying union adherents and informing Tyler that their union activities were under surveillance, by repeatedly instructing Tyler to issue disciplinary warnings in order to retaliate against union supporters, as well as by telling Tyler, as noted, that she was discharged because she refused to participate in the Respondent's antiunion activities. We also note that the Respondent never gave Tyler the opportunity to offer her version of the events that the Respondent asserted as the basis for her discharge. Based on *Wright Line*,[21] we find that the General Counsel has demonstrated that Tyler declined the Respondent's persistent requests to support its antiunion campaign, that the Respondent had animus towards her refusal to commit unfair labor practice violations against union adherents, and that the Respondent's subsequent discharge of Tyler was motivated by antiunion considerations.

We further conclude, as did the judge, that the Respondent has failed to establish, in accordance with *Wright Line*, that it would have discharged Tyler even in the absence of her protected activities. In so concluding, we stress that the Respondent, in attempting to justify Tyler's discharge, relied on evidence regarding her whereabouts on the evening that Tyler left work early purportedly to care for her sick daughter. But that evidence was not known to the Respondent at the time of the discharge. For these reasons, we adopt the judge's

[16] *Ten Broeck Commons*, supra at 811 (no exercise of independent judgment where LPNs' direction limited to seeing that basic tasks determined by each patient's long-term care plan are properly done.)

[17] *Ten Broeck Commons*, supra at 812. *Schnurmacher Nursing Home*, 214 F.3d at 265–266; *NLRB v. Provident Nursing Home*, 187 F.3d 133, 147 (1st Cir. 1999).

[18] Such a directive from higher management does not constitute evidence of independent judgment on the part of the LPNs in recommending or initiating discipline.

[19] *Provident Nursing Home*, supra at 147.

[20] All dates are in 1995, unless otherwise noted.

[21] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983).

finding that Tyler's discharge violated Section 8(a)(3) and (1) of the Act.[22]

4. We also agree with the judge that employee Robin Ransdell's discharge violated Section 8(a)(3) and (1) of the Act. Noting that Ransdell was not a leading union activist, the judge found that the Respondent had believed that she was the Union's ringleader on the night shift. Thus, the evidence shows that, on December 4, 4 days before the scheduled election,[23] Fink told Ransdell that she had heard that Ransdell was the ringleader for the Union. After Ransdell denied that she was, Fink asked her to identify those employees who she thought would vote for the Union. Ransdell refused to divulge this information. The following day, December 5, Ransdell met with Administrator Steer in her office. Steer said that she thought Ransdell supported the Union and accused her of trying to convert other employees into union supporters. It is clear, as the judge found, that the Respondent violated Section 8(a)(1) during these conversations by interrogating Ransdell about her union activities and those of other employees. Ransdell's discharge occurred the next day, on December 6, the day before the scheduled Board election.

In defending its action, the Respondent presented as witnesses Ransdell's fellow nursing assistants on the night shift, who each testified that she thought Ransdell had accused them of stealing $200 that Ransdell had left unattended in the Respondent's breakroom and later discovered missing. These employees testified that they told Director of Nursing Fink that they were offended by Ransdell's accusations and that they did not want to work with her. The Respondent terminated Ransdell, who was a probationary employee. Fink testified that she discharged Ransdell because she feared that Ransdell's coworkers would quit, leaving numerous vacancies on the night shift that she would have difficulty filling.

Applying *Wright Line*, we find that the General Counsel has met his burden of showing employer knowledge based on the Respondent's asserted belief that Ransdell was the union "ringleader" on the third shift,[24] that the Respondent harbored animus towards Ransdell and the Union as demonstrated by its numerous unfair labor practices, and that the Respondent's discharge of Ransdell was motivated by its union animus. We particularly note that the timing of the discharge further supports the finding of a violation**,** in that it occurred the day after the Respondent had unlawfully interrogated Ransdell on two successive days about her union activities and those of other employees.[25]

We further conclude that the Respondent has failed to establish that it would have discharged Ransdell in the absence of her suspected union activities. We stress that, as in Tyler's case, the Respondent summarily discharged Ransdell without giving her an opportunity to deny that she had ignored Fink's earlier instructions to her and accused other employees of stealing her money. Although the Respondent has argued that it lawfully decided to terminate Ransdell as a probationary employee who created problems on the night shift, we note that the Respondent had previously employed Ransdell for about a year in 1989, and that the Respondent had willingly rehired her in October 1995, based on its past experience with her work. Furthermore, Director of Nursing Fink described Ransdell as a "superb employee." Additionally, because the evidence establishes that the Respondent seldom discharges any employees,[26] we believe that it is an unlikely coincidence that the Respondent would have lawfully discharged two employees—Ransdell and Tyler—on the same day, when a union election was scheduled for 2 days later. We further note that Fink decided to discharge Ransdell even though the particular employee whom Ransdell, based on information that the police had given her, allegedly had accused of stealing, told Fink that she would accept an apology from Ransdell. Although three other employees thought that Ransdell had implicitly accused them of this offense and informed Fink that they would be uncomfortable working with Ransdell, there is no evidence that these employees led Fink to believe that they would quit if Fink did not discharge Ransdell. The Respondent's purported justification for the discharge is also refuted by evidence that, only 2 days before it terminated Ransdell, the Respondent had approved Ransdell's transfer from the nightshift to work a double shift on weekends that would have sig-

[22] Based on this finding, we find it unnecessary to consider the judge's finding that Tyler's discharge would have violated the Act even assuming that she was a statutory supervisor.

[23] The election was postponed on December 7 because the Union filed the initial unfair labor practice charge in this case, thereby blocking the election.

[24] The Board and the courts have long held that when the General Counsel demonstrates that an employer suspects alleged discriminatees of union activities, the knowledge requirement is satisfied. See, e.g., *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985).

[25] See, e.g., *Cal Western Transport*, 316 NLRB 222, 223 (1995) (employer violated Section 8(a)(3) and (1) by discharging an employee 1 day after coercively interrogating another employee about his union activities and by discharging a third employee 1 week later).

[26] For example, the evidence shows that the Respondent did not discharge employee Dana Harrod even though she had received three written warnings for excessive absenteeism, including a final warning, and a second final warning for "being dishonest," leaving work early without permission, and failing to follow her supervisor's directions. By contrast, the Respondent immediately discharged Tyler, purportedly for "lying," without affording her any final warnings.

nificantly reduced her contacts with the employees who had complained about working with her.

For all of these reasons, we conclude that the Respondent seized on the events that followed Ransdell's loss of her money as a reason to discharge an employee whom it considered a union "ringleader." Thus, we agree with the judge that, under *Wright Line*, the Respondent has not proven by a preponderance of the evidence that it would have discharged Ransdell in the absence of union considerations. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ransdell.

AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 3(a) and reletter the subsequent Conclusions of Law in paragraph 3, accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Heritage Hall, E.P.I. Corporation, Lawrenceberg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by Region 9, post at its various facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 1995."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with discharge and loss of employment because of their union activity or expression of union support.

WE WILL NOT prohibit our employees from distributing union literature in a nonwork area.

WE WILL NOT prohibit our employees from entering the facility in retaliation for their union support.

WE WILL NOT threaten our employees with closure of the facility, the loss of jobs, and with reprisals, such as loss of pay, loss of profit sharing, loss of holiday pay and vacations, and mandatory weekend work.

WE WILL NOT engage in surveillance of our employees and their union activity.

WE WILL NOT instruct our employees to issue disciplinary warnings because of other employees' union activities.

WE WILL NOT inform our employees that they were discharged because they refused to engage in antiunion activities.

WE WILL NOT interrogate and poll our employees about their union sympathies.

WE WILL NOT discharge or suspend any employees because of their union support.

WE WILL NOT discharge our employees because they refuse to engage in antiunion activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robin Ransdell and Barbara Gail Tyler immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robin Ransdell, Barbara Gail Tyler, and Brenda Norman whole for any loss of earnings and other benefits resulting from their discharges or suspension, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges and suspension and WE WILL notify them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

HERITAGE HALL, E.P.I. CORPORATION

Mark G. Mehas, Esq., for the General Counsel.
John Greenebaum, Esq. and *Walter Sales & Tom Williams, Esqs. (Ogdon, Newell & Welch),* of Louisville, Kentucky, for the Respondent.
Irwin H. Cutler Jr., Esq. (Segal, Isenberg, Sales, Stewart, Cutler & Tillman), of Louisville, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Lexington, Kentucky, on April 30, May 1–2, and May 7–8, 1996, on a consolidated complaint dated April 5, 1996. The underlying charges were filed by the Union, Kentucky Laborers' District Council, Laborers' International Union of North America, Local 575, AFL–CIO, in Cases 9–CA–33459–1,–3,–4,–5 on December 7, 12, 13, 1995, and in Case 9–CA–33658 on February 29, 1996, and by Richard T. Beck, an individual, in Case 9–CA–33522 on January 1996, alleging that the Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The issues raised by the complaint are whether the Company, Heritage Hall, E.P.I. Corporation, a health care institution within the meaning of Section 2(13) of the Act, had (a) threatened its employees with discharge, loss of jobs, and other reprisals because of their union support; (b) coercively interrogated them about the Union; (c) created the impression of surveillance of their union activity; (d) instructed an employee to discipline others because of their union activities; (e) informed employees that they were supervisors to discourage them from their union support and otherwise restrained and coerced them because of the Union. Also at issue are whether the Respondent unlawfully suspended and refused to promote its employee Brenda Norman, refused to hire Richard Beck, and discharged two employees—Barbara Gail Tyler and Robin Ransdell.

The Respondent's answer admitted the jurisdictional aspects of the complaint and denied that the Respondent had engaged in the alleged unfair labor practices.

On the entire record in this case, including my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Heritage Hall, E.P.I. Corporation, is engaged in the operation of a nursing home in Lawrenceberg, Kentucky, had gross revenues in excess of $100,000 and purchased goods valued in excess of $5000 directly from points outside the State. The Company is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(13) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Heritage Hall facility in Lawrenceberg, Kentucky, is a nursing home which in addition to its administrative personnel is staffed by registered nurses (RNs), licensed practical nurses (LPNs), certified medication aides (CMAs), certified nursing assistants (CNAs), and nursing assistants (NAs).

The Union was contacted on September 27, 1995, by Heidi Stoeberl who had expressed an interest in being represented by a union. On October 3 Paul Barrick, the Union's business manager, met with about eight employees. They signed union authorization cards and received additional cards for distribution to their coworkers. The Union filed a petition for an election to be held on December 8, 1995, seeking the representation of the Company's nursing assistants, housekeepers, janitors, dietary employees, maintenance employees, and laundry workers (GC Exh. 13). On December 7, 1995, the Union blocked the election with charges that the Company had engaged in unfair labor practices.

Even though the election set for December 8 was canceled, the Respondent proceeded to hold an election, referred to as a "mock" election. The Respondent engaged in other conduct which is alleged as unlawful as discussed below.

The General Counsel presented 12 witnesses, including Jennifer Steer, administrator of Heritage Hall, Paul Barrick, the Union's business agent, Richard Beck, organizer for the Union, employees Brenda Norman, Barbara Tyler, and Robin Ransdell, who were discharged or suspended, and other present and past employees who testified about the conduct of John Snyder, the owner of the facility, Administrator Steer, Alice Fink, director of nursing, Julie Bibb Reynolds, assistant director of nursing, Linda Pilkington, charge nurse, and Tom Forshee and Judy Boggs labor consultants. Testifying for the defense were 17 witnesses, including the administrator, the director and assistant director of nursing, registered nurses, licensed practical nurses, nurses' assistants (CNAs, CMAs), as well as a receptionist, and two outside employees.

The consensus of the testimony is that the Respondent opposed the Union's organizational attempt, that John Snyder made a speech to the employees about the Union, that the administrators held numerous meetings with the staff about the Union, that Tyler and Ransdell were discharged, and that Brenda Norman did not work for about a week. Also uncontested is that Richard Beck was not provided with an employment application by the receptionist.

The initial issue is whether or not LPNs were supervisors within the meaning of the Act at Heritage Hall. In *Ten Broeck Commons*, 320 NLRB 806 (1996), the Board held that LPNs are not supervisors. The Respondent argues that unlike *Ten Broeck*, Heritage Hall LPNs and RNs had the same responsibilities with the authority to supervise CNAs, CMs, and NAs. The hierarchy consists of Jennifer Steer, administrator, Alice Fink, the director of nursing who is assisted by Julie Bibb Reynolds, assistant director, who are present at the facility from 8 a.m. to 5 p.m. In addition, two charge nurses cover the day and evening shifts, Mary Goodlett who works from 7 a.m. to 3 p.m. and Ted Kiser who is there from 3 p.m. to 11 p.m. They generally oversee the operation and are clearly available to provide directions to the staff. During the three shifts, one RN is usually assigned to the skilled care unit and one or two nurses, an RN or LPN, are assigned to the other units. In addition, there are 5 to 10 nursing assistants and 2 CNAs during the three shifts with the lowest number of staff during the nightshift. The record clearly shows that the LPNs and nursing aids are supervised by one of the two charge nurses during the day and evening shifts, while the nightshift operates without the presence of a charge nurse. However, when necessary, the charge nurse is available at home to receive calls for directions from the nurse on duty during weekends or nightshifts. Terri Pointer, a supervising nursing assistant, routinely prepares the schedules for the nursing aides on a weekly or biweekly basis, while the assistant director of nursing, Bibb Reynolds, prepares a list of patients as well as their required care and needs for the particular day. This system establishes the duties of the nursing aides and the needs of the patients on a daily basis. The LPNs and RNs at Heritage Hall followed their own routine in the care of patients. An LPN for example would perform the following duties (Tr. 290):

> On a—on an average day, the majority of the time when I was working, I would probably work skilled—the skilled unit, which I did a lot of tube feedings, minor skin tear treatments, admissions, sending people out with transfers to doctor's offices, or different nursing homes, or et cetera, and daily charting, taking doctor's orders off.

The job duties of a nursing assistant was described as follows (Tr. 290):

> They would do showers, whirlpools, hands-on care with oral care, you know, bathing them, washing their hair, feeding them, getting them up, getting them dressed, laying them back down for naps, passing ice, making the beds up, things like that.

As to whether an LPN gives instructions to the nursing assistants, LPN Tyler testified that the assignments have been made (Tr. 291):

> We have a ledger book that stayed at the blue nurse's station. And, like I had said before, I'm not for sure if it's done weekly or biweekly, but when we come in the morning—when the nurses come in the morning, we look at a shower list that Julie Bibb does, who is the assistant DON, and it'll say who's having a shower today.
>
> And then we take that, go to the ledger book for the nursing assistants that Terrie Pointer has made out, and she had assigned very—which nursing assistant's there, what hall they're working, and we just put it down on our paper so we know for our own reference who's working with us.

Tyler also explained that aides who call in to report that they cannot report for work usually speak to the charge nurse on duty or at night to "whoever takes the call" (Tr. 292). While the RNs or LPNs were informed that they could "write up" aides, few exercised that authority. For example, Gerri Wilson testified that she never exercised that authority. The LPNs do not perform any duties relating to the employment of nursing assistants. If, on a rare occasion, an LPN acts in that capacity, it is under the direct supervision of a charge nurse. A nurse has the authority to send a nursing aid home for gross misconduct but this happens only rarely. In short, LPNs generally worked in patient care on a higher skill level than the nursing aides. They in turn were assigned to their duties by a staffing coordinator. Instead of LPNs giving directions or making assignments, it is more common for nursing assistants to approach an LPN or an RN and make a request for their assistance or guidance. Under these circumstances it is clear that the LPNs were not supervisors within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

The record supports many of the allegations in the complaint. Administrator Steer first learned about the union drive in the middle of October. She met with Paul Barrick during the last week in October. He informed her of his intention to organize the employees and to file a petition with the Board. In his role as a minister, Barrick had enjoyed free access to the Home. In a subsequent conversation with John Snyder, owner of Heritage Hall, Steer complained about Barrick's role with the Union, his official capacity with OSHA, as well as his calling to the ministry. Snyder informed Barrick by letter of October 31, 1995, that, henceforth, he was "prohibited from setting foot on Heritage Hall's premises" (GC Exh. 14). Steer testified that the union election caused tension among the employees, and that she told Brenda Norman not to report for work on the day of the election out of concern for her safety. Norman was ultimately informed by management that she could return to work. Steer also testified that Snyder decided to proceed with the election to be conducted by Attorney David Webb, even though the Board election had been canceled.

Steer did not deny having made the statements attributed to her. For example, during one of the meetings shortly after Thanksgiving, Steer told Gail Tyler and others (Tr. 314):

> . . . that there was a facility in E-town, that a union had tried to come in and stayed in about a year, and that the Union wasn't good for a healthcare facility, and before John Snyder would allow one to come in, they'd close the doors.

Shortly after Thanksgiving 1995 Steer conducted an anti-union meeting with the staff and made the following comments (Tr. 310–311):

> And she went on to tell us that she had found some pamphlets in the break room over the weekend when she come—come in to get the time cards. And she wanted us to know that they were not allowed in the building, and that she had taken them and shredded them, and that we were not supposed to have them in there.
>
> And she also heard that there was an LPN that had signed a union card, and she was in there to tell us, she didn't care if they were an LPN, and RN, a department head, that if we weren't there to support EPI, then we would no longer have a position there.

During a subsequent meeting with Tyler, Steer said to her the following (Tr. 316):

> And, she went on to tell me in the meeting that I was to watch the ringleaders of the Union that were trying to get the Union in.
>
> She stated their names, that I was to watch Heidi, I was to watch Brenda, I was to watch Anna Harvey, I was to watch Shana Jackson, because they couldn't get them out because of the Union, but if we would write them up and get these write-ups on them, that we had to prove a point, and we would get them out that way, and that would be legal.
>
> I went on to tell Ms. Steer that she better watch what she's doing, because she's going to get into a lawsuit because the girls weren't doing anything illegal, and that I wasn't going to watch them do nothing, I was not going to write them up.

She went on to tell me that I was a good nurse, and that she would hate to lose me with EPI. . . .

Gerri Wilson, another LPN had a similar conversation with Steer (Tr. 634):

> We were told that they, meaning management, could not by law fire anyone who was prounion but that it was our job and our duty to monitor, eavesdrop, spy, whatever needed to be done to get these people out of the building.
>
> . . . .
>
> If they were to be in the break room for extended periods of time we were to write them up. If they took extended lunches we were to write them up. Whatever needed to be done to write them up.

On December 2, 1995, Heidi Stoeberl, the most prominent union supporter, went to Heritage Hall to pick up certain personal items. Steer observed her doing this on her day off and told Stoeberl that she was prohibited to enter the facility until after the union's stuff was finished. Other employees were permitted to enter the facility and Stoeberl had entered Heritage Hall on prior occasions. Steer's conduct was a clear reaction to the union activity.

On December 5, 1995, as several employees were assembled in the breakroom, the employees were told that Fink or Steer wanted to speak with them individually. Robin Ransdell volunteered and met with Steer in her office and the following conversation ensued (Tr. 582–83).

> I just shook my head in agreement. Then after she had asked me that, she said that she heard that I was for the union and that I was trying—she asked if I was trying to convert people for the union and I denied it and at that time she told me, you know, that's all.

Based on the foregoing summary of the record, I find that the Respondent repeatedly violated Section 8(a)(1) of the Act as alleged in the complaint, Steer informed LPNs that they were supervisors and unable to vote or engage in union activities; she threatened employees with discharge or loss of employment because of their union activity; she created the impression that the employees' union activities were under surveillance; she prohibited employees from distributing union literature in a nonwork area; she prohibited an employee from entering the facility in retaliation for her union activity, and she coercively interrogated an employee about her union activity.

Gerri Wilson a private duty nurse who had worked for Heritage Hall testified that Alice Fink on several occasions made the same or similar statements. In mid-October, Tom Forshee had a meeting with all the employees. He was introduced to the staff as the labor consultant and informed the group that RNs and LPNs were in charge positions and not able to vote in the union election. Thereafter, Fink held meetings with the nurses' staff virtually on a daily basis where it was emphasized that LPNs were unable to vote because they were considered charge nurses.

Barbara Tyler and Alberta Burns recalled that in meetings in October, Fink stated that Snyder would close the doors of Heritage Hall and shutdown the home if the Union were selected and that the Union had nothing to offer the employees.

During a meeting with the third-shift nursing assistants about the skilled area of Heritage Hall, Fink commented that if the employees thought that things were bad now, they could expect a lot worse if the Union came in.

In early December, prior to the election, Fink discussed weekend work with a nursing assistant, Shana Jackson, who had expressed her reluctance to work on weekends. Fink said to "keep in the back of my mind that if the Union comes in [on election day], that my weekends would mean nothing and that she would no longer be assured of having certain weekends off. At about the same time, in early December, Fink said to Brenda Norman, a union activist, that John Snyder was going to increase the bonuses, but, when he heard that employees were interested in a union, Snyder would not give them anything.

On December 4, 1995, Fink spoke with Gail Tyler and said that she knew that an LPN had signed a union card. In that connection, Fink also told her repeatedly that as LPN she was to watch the union ringleaders and to write them up and get them out. Fink praised her as a nurse and said that she would hate to lose Tyler. Stating that she was watching the ringleaders including Brenda Norman, Heidi Stoeberl, Anna Harvey, and Shana Jackson, Fink said that she would get rid of one of them to prove her point. Fink had urged Tyler as early as November 28 to write-up union activist, Heidi Stoeberl, for any reason but to write "her ass up" (Tr. 324–325). At about 9 a.m. or 10 a.m. of December 4, Fink observed several employees in a patient's room, she instructed Tyler as follows (Tr. 321):

> She said I want you to go in there and see what they're doing and if they're there talking about the Union, you're to write them up.

On the same day, December 4, employee Robin Ransdell called Fink about an incident in the breakroom, reporting that $200 was missing from Ransdell's purse. During the telephone conversation Fink asked Ransdell whether she was a union ringleader. Fink also requested that Ransdell inform her who among the employees would support the Union.

On December 6, 1995, Fink discharged Tyler in connection with an incident involving her ill daughter—as more fully described below. Fink observed that Tyler was upset and told her (Tr. 353): "If you don't have enough backbone to support EPI, then you don't need to be employed here anyway." On the same day, 2 days before the election, the Respondent held a meeting with the employees about the Union. Brenda Norman, had several questions. She asked, for example, if she would be treated any differently now that she was known to be for the Union. Fink replied, "well, I haven't treated you any differently up until now, have I, Brenda" (Tr. 41). On the following day, December 7, 1995, Fink walked up to employees Shana Jackson and Anna Harvey and said, "I can't believe Brenda . . . wait until I see her tomorrow, that little bitch" and added that she would "get her" (Tr. 469).

Fink also had a telephone conversation with Dawn Mitchell on December 6 or 7. Mitchell who had been employed for about a year as a CNA and expected a pay raise at that time testified that Fink told her that the union election (which had been blocked by the Union) would still be held but that the union representatives would not be present. Fink also said that she could not give any pay raises because they were on hold until after the official election.

On the basis of the record evidence, summarized above, I find that the Respondent violated Section 8(a)(1) of the Act by the conduct of Alice Fink, one of the highest executives at the facility, by (a) threatening employees with closure of the facility, with the loss of jobs, with reprisals, including no more holiday pay or vacations, and mandatory weekend work; (b) coercively interrogating employees about their union activity; (c) engaging in surveillance of employees and their union activities; (d) repeatedly instructing an employee to issue disciplinary warnings because of their union activities; (e) informing an employee that she was discharged because she refused to engage in antiunion activities; (f) and by threats of reprisals because of an employee's expression of union support.

The record also shows that Tom Forshee and Judy Boggs were hired as labor consultants, and, as agents of the Respondent, had informed the LPNs that they could not vote in the union election. Boggs met privately with Tyler in October 1995 in the conference room and introduced herself as an associate of Forshee. Boggs asked Tyler whether she had decided which way she should vote. Boggs also asked Tyler "which way did [she] think [t]he girls was going to vote." Tyler attempted to leave, but Boggs insisted that she stay and asked "why [she] thought the Union would benefit the girls if the Union came in there" (Tr. 303–304). Steer momentarily participated in the meeting and urged Tyler to do her best. Under these conditions, the Respondent unlawfully interrogated Tyler.

In early December 1995 Linda Pilkington, a charge nurse, and Anna Harvey worked together in a patient's room. Pilkington spoke about the Union and listed by name several employees who were against the Union. She also said that if the Union were selected by the employees, they would lose the profit sharing, holiday pay, and vacation pay. Pilkington was a supervisor. The Respondent violated Section 8(a)(1) of the Act with threats that employees would loose there benefits.

Alleged as a violation of Section 8(a)(1) was John Snyder's speech to the employees on December 6, 1995. The content of the speech was tape recorded and transcribed in the record. Although Snyder stated in persuasive language that he and Steer—not the Union—can best take care of the employees' problems, I am not convinced that these statements in the context of the speech amounted to an unlawful promise of benefits to dissuade the employees from their union support. His speech was part of a vigorous antiunion campaign and expressed management's opinion of the employees' best interests. I would dismiss this allegation in the complaint.

Finally, the election which the Respondent conducted even though the official election was canceled, is alleged as an attempt to poll the employees' union sentiment. On December 7 when the Company was notified that the official election would be postponed because the Union had filed unfair labor practice charges, Forshee urged the employees to proceed with the election. The Respondent hired a lawyer, David Webb, to officiate. He followed the official procedures by posting a notice in the breakroom, by formally notifying the Union, and scheduling the election at the same time and place as originally scheduled. He used copies of a sample ballot and after counting the votes, posted the results that the Union was not voted in. This procedure did not comply with the established safeguards of *Struksnes Construction Co.*, 165 NLRB 1062 (1967), particularly the requirement that the employer has not engaged in unfair labor practices and free of a coercive atmosphere. I accordingly find that the allegation of unlawful polling is supported by the record.

Brenda Norman

Brenda Norman had been employed by Heritage Hall since December 13, 1993, as a CNA. On December 7, 1995, 1 day before the Company held a union election, Alice Fink referred to Norman and said to Anna Harvey and Shana Jackson (Tr. 59, 469, 499): "I am going to get that little bitch tomorrow." Fink did not deny using the word "bitch" in reference to Norman because of her questions about the Union at the December 6 meeting. On December 8, 1995, Jennifer Steer told Norman that she was not to report for duty for reasons of safety. According to Steer, the level of tension was high due to the union election. Norman who had been heard about Fink's threatening remark did not work for several days. By letter of December 8, 1995, addressed to Steer, Norman requested that she be informed when she could return to work (GC Exh. 7). By letter of December 12, 1995, Steer informed Norman that she could return for work immediately (GC Exh. 8). As a result, Norman lost 5 days of work. Although Norma was permitted to make

up the days missed, she declined because it would have meant a full week of work without a weekend break (Tr. 164).

Brenda Norman was a known union supporter who spoke up at an employee meeting on December 6, 1995. Snyder had given an antiunion speech and Norman asked him if the Union was so bad why were they fighting so hard and putting up so much money to keep it out (Tr. 40). She also asked openly if she and the other union activist would be treated differently as a result of her union support. Fink replied, "I haven't treated you any differently up until now, have I Brenda" (Tr. 41).

The Respondent concedes that Norman was an open union supporter but argues that the tensions were high because of the union election and that she could have made up the time she lost during the absence. The record, however, is clear that Fink threatened Norman, because of her union support, that Norman was told to stay home because of the union election, and that she lost time as a result of the suspension. The General Counsel has clearly shown that the suspension was union related. The Respondent has failed to show that the suspension would have occurred even in the absence of the union activity by this employee. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I accordingly find that the Respondent violated Section 8(a)(3) and (1) of the Act.

The allegation of an 8(a)(4) violation should be dismissed. The General Counsel has failed to establish a prima facie case that Norman's promotion to a full-time job was denied because she gave testimony to the Board. Moreover, the Respondent has shown that another employee, Sarina Burgin, received a higher evaluation by an outside organization and was therefore promoted instead of Norman.

Robin Ransdell

Robin Ransdell had worked for Heritage Hall in 1989 for about a year and was hired on October 6, 1995, as a nursing assistant. On December 6, 1995, Ransdell was discharged even though her job performance was described by Fink as follows (Tr. 1236):

> It was satisfactory. She was not a bad employee. She was a superb employee she did an adequate job as far as I was aware.

The Respondent argues that contrary to the allegations in the complaint, Ransdell's discharge had nothing to do with her union activity, and that, in any case, Ransdell's was not known to be a union activist. It is true that Ransdell was not the most active union supporter. But the Company believed that she was the "ring leader for the union on third shift." Ransdell had openly expressed her opinion at a gathering in the breakroom on third shift stating (Tr. 574–575): "I think a union would be good at Heritage Hall as far as management treats the employees."

In my view, the Respondent's reasons for discharging Ransdell involves a circuitous scenario with an implausible ending. On November 30, 1995, while assigned to the nightshift, Ransdell shared a letter from a family friend with Linda Earlywine, another employee, in the breakroom. Ransdell also revealed that $200 was enclosed with the personal letter, and that the money was intended for her children. She left her purse containing the letter and the money in the breakroom for the remainder of her shift. She went home and discovered the next morning that the money was missing. Ransdell called Alice Fink to repeat the loss of the $200. Fink advised her to report the matter to the police and to post a notice in the facility requesting that the money be returned "with no questions asked."

Ransdell followed the instruction. She put up a note, she filed a report with the police and received information from the police that Judy Bowers, a fellow employee, was a likely suspect. Fink advised Ransdell not to disclose to anyone what the police had said. Nevertheless, the secret got out and Judy Bowers felt unjustly accused. Other employees also took offense. Linda Bowman for example, testified that she also felt accused and tore down the note which Ransdell had posted.

On December 4, 1995, Ransdell called Fink to inquire about her schedule and the missing money. Fink informed her that she had approved Ransdell's request for weekend work and also said that she was trying to collect some money to replace the loss for Ransdell's children. In that connection, Fink told Ransdell that she had heard that she was the ringleader for the Union. Ransdell denied that rumor. Fink then asked "who I thought would vote for the union" (Tr. 578).

Two days later, on December 6, 1995, the assistant director of nursing, Julie Reynolds, told Ransdell to come to her office where Reynolds asked for her resignation. Ransdell asked whether the decision had anything to do with the Union. Reynolds replied, no, and said, "it's just not working . . . and to see Mrs. Fink" (Tr. 591). On the next day, Fink spoke to Ransdell and explained that if she did not get rid of Ransdell, she would lose the entire third shift. Ransdell then asked for an assignment to a different shift, but Fink said that she had nothing for her.

The record supports the Respondent's version of the events that Ransdell's coworkers resented her accusations and expressed a reluctance to work with Ransdell. Linda Earlywine, Judy Bowers, and Linda Bowman jointly went to meet with Fink, Bowman informed Fink that "she did not want to work with someone who would accuse me of being a thief" (Tr. 750). Earlywine testified that they told Fink that they "didn't want to work with her" (Tr. 775). And Judy Bowers, the most aggrieved, testified that she did not recall telling Fink that she would refuse to work with Ransdell. Instead, she recalled saying that, "it would be hard for me to work with her directly, just like we were doing" (Tr. 732). Bowers also said that she would accept Ransdell's apology. According to Fink, Angela Edwards also approached her expressing a similar sentiment about Ransdell. Fink testified as follows about her decision for the discharge (Tr. 1183):

> I make the determination that I was going to terminate Robin because she was probationary, she hadn't been there but two months and all this problem was going to cost me some staff that had been there for several years.

In my consideration of Respondent's true motive for Ransdell's discharge, I am mindful of the numerous 8(a)(1) violations, including several threats of loss of jobs. The timing of the discharge during the height of a union campaign is often a

reliable indicator of an employer's sentiment. Although Ransdell was not a ringleader for the Union, management perceived her as one. Ransdell also refused to comply with Fink's suggestion that she reveal the union sympathizers on third shift. Moreover, Fink may have hoped that appeasing the employees on the third shift who had turned against Ransdell would persuade them to management's point of view during the union campaign. Considering the evidence that the Respondent has rarely fired any of its employees in the past, I believe that the General Counsel has established a prima facie case that the Respondent discriminated against Ransdell because of union considerations. Whether or not the Respondent succeeded in showing that Ransdell would have lost her job even in the absence of any union consideration is a close question and, in my opinion, a true dual motive situation. *Wright Line,* supra 251 NLRB 1083.

Would the ordinary employer ignore a reported theft among the employees and tolerate the situation to get out of control and merely counsel the aggrieved employee, with the result that the employee ends up also losing her job while a suspect remains employed? To be sure, the record supports the Respondent's argument that several employees informed Fink of their reluctance to work with Ransdell. One course of action would be to simply remove the aggrieved employee, but another, more plausible, way would be to make an effort to ascertain whether there was a theft and then to find the perpetrator. During that time, Ransdell could have been reassigned to a different shift. A capable administrator like Alice Fink had a number of choices short of discharging an employee who was admittedly well regarded as an employee. I believe that Fink would not have discharged Ransdell had it not been for the union campaign. I accordingly find that the Respondent failed to establish a defense to the General Counsel's prima facie case of an unlawful discharge.

Barbara Gail Taylor

On December 6, 1995, 2 days before the union election, the Respondent discharged Barbara Gail Tyler, an LPN, almost simultaneously with the discharge of Ransdell. Tyler had been employed there in 1988 and 1989 as a nursing assistant, she subsequently went to nursing school and became employed again in June 1995 as an LPN. According to the Respondent, Tyler functioned as a supervisor and is accordingly not protected by the Act. The General Counsel and the Union argue that Tyler was not a supervisor, but even if she were considered to be one, she would be protected under the circumstances here where the Company discharged her for refusing to engage in unfair labor practices.

Fink testified that Tyler had a chronic absenteeism problem and had received two written warnings. However, the problems were not considered serious enough to keep her from completing her probationary period. Her evaluation at the completion of the probationary period showed that she had "good nursing ability" (R. Exh. 3). Fink testified that she fired Taylor after she heard about an episode involving her sick child and after she spoke to Administrator Steer explaining the reason as follows (Tr. 1206):

> I don't know if the lying was the ultimate thing or another absence. I think it was the combination that I couldn't trust her and the fact that she was again missing and this time she lied to do it.

It began on December 5, 1995, when Tyler was scheduled to work a double shift from 7 a.m. to 11 p.m. During the afternoon, Tyler received a phone call from her husband reporting that their daughter Ashley was ill with a strep throat, that she was dehydrated and had received intravenous fluids. Tyler promptly made an effort to find a replacement for her shift and spoke with several nurses informing them that her daughter was being admitted to the hospital.[1] Vicki Vaught reluctantly agreed, so long as she would go home first to take care of some business. She returned at 6:30 p.m. and took over Tyler's shift. Vaught testified that she soon found the ward in disarray and that she had to make up the work left for her by Tyler. Vaught was angry and upset and wanted to talk to Tyler about the care of a patient. She spoke to Fink who authorized her to call the hospital to locate Tyler. Vaught called several hospitals but none reported that Tyler's daughter had been admitted. Vaught also called Tyler's home but was unsuccessful in locating Tyler and concluded that Tyler had lied to her about the hospitalization and testified as follows about her own reaction (Tr. 808):

> I don't know I was dumbfounded because I had come to work for someone who had told me. I guess a lie, apparently a lie and here I was working my butt off. . . .

Vaught informed Fink, who advised her to prepare a written report (R. Exh. 9). Based on this report and a similar report by Charge Nurse Goodlett, Fink discharged Tyler following a meeting on December 6, 1995, "because of all the lies." Fink refused to hear Tyler's side of the story even though it is undisputed that her child was actually ill.

The real motive for the Company's action, according to the General Counsel and the Union, was Tyler's refusal to follow Fink's instructions to write up union activists, to spy on them, to identify them, and to engage in antiunion conduct. Tyler testified that she did not engage in any union activities, and that management had informed them that LPNs were supervisors, unable to participate in the union election. Management, however, attempted to involve Tyler in antiunion activities.

Tyler testified that in a meeting with Tom Forshee and Judy Boggs, labor consultants employed by the Respondent, she was asked how the employees would vote in the scheduled union election. At one point, when Steer had briefly joined the meeting, Tyler said that she would not answer any more questions about the Union because she was told that she could not vote for the Union. Boggs told Tyler that she did not mean to pressure her but that she wanted to know "how the girls was going to vote." Boggs also told her "to get the facts straight about the Union" and that she should tell them "that the Union didn't have anything to offer the girls" (Tr. 306). Tyler refused to cooperate and left the meeting. Shortly after the meeting, Fink

[1] Although the record is somewhat unclear whether Tyler made a specific reference to the hospitalization of her daughter, the consensus of five or six witnesses is that Tyler referred to the need for an I.V. at the hospital.

approached her at the nurses' station and said that she had heard from Steer that Tyler was upset about the meeting with the labor consultant and that she should realize that management was doing this "for the good of the girls," because John Snyder would close the doors down before he would allow the Union to come in. Fink urged her to talk to the nursing assistants "and convince them not to have the Union come in" (Tr. 307). Tyler responded that the employees were adults and that she did not want to get involved.

At a meeting after Thanksgiving 1995 Steer made a comment about an LPN signing a union card. Thereafter, Tyler went to Steer's office where the following conversation occurred (Tr. 316):

> And, she went on to tell me in the meeting that I was to watch the ringleaders of the Union that were trying to get the Union in.
>
> She stated their names, that I was to watch Heidi [Stoeberl], I was to watch Brenda, I was to watch Anna Harvey, I was to watch Shana Jackson, because they couldn't get them out because of the Union, but if we would write them up and get these write-ups on them, that we had to prove a point, and we could get them out that way, and that that would be legal.
>
> I went on to tell Ms. Steer that she better watch what she's doing, because she's going to get into a lawsuit because the girls weren't doing anything illegal, and that I wasn't going to watch them do nothing, I was not going to write them up.
>
> She went on to tell me that I was a good nurse, and that she would hate to lose me from EPI. . . .

Tyler testified that Fink repeatedly urged her that she should watch the Union's ringleaders, like Heidi Stoeberl, and write them up for minor incidents. Tyler, however, made it clear that she refused to cooperate even if she were threatened because it was illegal for her to do that.

On December 4, 1995, several nursing assistants were congregated in a particular patient's room. Fink asked Tyler about it and suggested that the Union's ringleaders were there together talking about the Union. Tyler checked the room and discovered that several aides were lifting a particularly heavy patient. Tyler reported this to Fink, but Fink listened at the door for several minutes and then told Tyler (Tr. 323):

> She said, "I'm sick of this crap," she said, "you write their ass up." And I said, "Alice, they're not doing anything." And she said, "You heard what I said," She said, "I told you to write them up, and I mean you write them up."

Fink was particularly adamant about Heidi Stoeberl, who had started the union activity (Tr. 325):

> And I walked back out, and Alice says, "Well, you watch her," she said, "I want you to write her ass up." And I said, "Alice, I'm not writing her up." I said, "If you want her wrote up," I said, "you write her up, I'm not doing it."

In spite of repeated instructions from management to discipline the union activists, Tyler refused. Her discharge on December 6 in connection with her absence to take care of her daughter brings into focus the dual motive issue. I find that the General Counsel has shown by a preponderance of the evidence that the true motive for Tyler's discharge was her resistance to engage in antiunion activities and her refusal to discriminate against union activists. The episode based on Vaught's complaints provided management with the convenient excuse to retaliate against Tyler, I further find that the Respondent failed to show that Tyler would have been discharged even in the absence of union considerations, under the *Wright Line* defense.

The record shows that management has refrained from firing its employees in the past, because the work is considered difficult and the jobs are difficult to fill with qualified individuals. The timing of the discharges, only 2 days prior to the scheduled election, is an indication of management's real motivation. Moreover, Tyler was considered a good and competent nurse. This employee would not have been fired based on the slightly exaggerated report from nurse Vaught, who felt cheated when she could not locate Tyler's ill child in one of the hospitals. She accused Tyler of lying but she herself played impostor when placing a second call to Tyler's home and asking another employee to assume her role.

A seasoned supervisor, like Fink, would not have ignored a physician's statement, and she would not have refused to let the employee, Tyler, give her side of the story. Tyler had generally acted like a responsible employee, faced with an ill daughter. She secured permission from management to find a replacement for her shift, and she did not abandon her workstation until the substitute nurse arrived. Nor did Tyler misrepresent her predicament. Her child was ill and needed her mother's attention. And it seems of little practical consequence whether Tyler, a nurse, was able to handle the situation short of hospitalization. Fink would have acted differently, had it not been for Tyler's refusals to cooperate with management. Fink in so many words admitted it when she told Tyler (Tr. 353):

> If you don't have enough backbone to support EPI, then you don't need to be employed here anyway. . . .

Even if Tyler were considered a supervisor within the meaning of the Act, I find that her discharge violated the Act based upon the factual scenario outlined above.

Tim Beck

According to the complaint, the Respondent unlawfully refused to consider Tim Beck for employment because of the Union. Beck was a union organizer who was present at the facility on December 7, 1995, as he and five employees distributed union literature outside the entrance. Beck went into the nursing home the next day on December 8, 1995, with Tyler who asked the receptionist, Mary Hagan, whether she could speak with Steer, Steer was unavailable, Tyler then requested her paycheck. Hagan handed her the paycheck and Tyler and Beck left.

On the following day, December 9, Beck had instructions from the Union to deliver a letter. He visited the facility in the

morning and testified as follows about his attempt to apply for a job (Tr. 542–543):

> I asked the lady who was identified to me earlier as Ms. Hagan if Ms. Jennifer Steer was there. She told me she was not. I asked her if they were doing any hiring. She asked me for what. And I asked her for, you know, maintenance, just—just anything.
>
> And she said nurses. And my reply was, nurses only? She said yes. I asked her if I could have an application.
>
> She said she could not give her one. I asked her—I produced an envelope, asked her if she would give that to Ms. Steer. She said yes. And I exited the building and left.

Beck admitted that at no time did he identify himself. He did not know if management had observed his handbilling activity or otherwise knew him. Indeed, he was unable to identify anyone from management at that time. Even though the record shows that the Respondent was looking for employees, the General Counsel has not shown that Beck was identified with the Union when the receptionist refused to hand him an application. Moreover, Hagan refused to provide him with an application only after Beck had indicated that he was interested in a maintenance job. Under these circumstances, the record does not support the General Counsel's argument that the Respondent discriminated against Beck because of his union affiliation. I would therefore dismiss this allegation in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Heritage Hall, E.P.I. Corporation, Lawrenceburg, Kentucky, is an employer within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(13) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by

(a) Informing its employees who were LPNs that they were supervisors and unable to vote in the union election.

(b) Threatening employees with discharge and loss of employment because of their union activity or expression of union support.

(c) Creating the impression that the employees' union activities were under surveillance.

(d) Prohibiting employees from distributing union literature in a nonwork area.

(e) Prohibiting an employee from entering the facility in retaliation for her union activity.

(f) Threatening employees with closure of the facility, loss of jobs, and with reprisals such as loss of benefits, loss of pay, loss of profit sharing, loss of holiday pay and vacations, and mandatory weekend work.

(g) Coercively interrogating employees about their union activity.

(h) Engaging in surveillance of employees and their union activities.

(i) Repeatedly instructing employees to issue disciplinary warnings because of their union activities.

(j) Informing an employee that she was discharged because she refused to engage in antiunion activities.

(k) Interrogating and polling its employees about their union sympathies.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by

(a) Suspending its employee Brenda Norman, because of her union support.

(b) Discharging its employee Robin Ransdell because she was a suspected union activist, and discharging its employee Barbara Gail Tyler because she refused to engage in antiunion activities.

6. The unfair labor practices found to have been committed affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and, further, take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent remove warnings from the files of employees I have found to have unlawfully received those warnings from the Respondent, and that those who have been unlawfully suspended by the Respondent shall be made whole by the payment to them of backpay for those periods they were unlawfully suspended, with interest.

I shall further recommend that employees who have been found in this decision to have been unlawfully discharged, shall be offered reinstatement to their former or substantially equivalent positions with no loss in seniority or other rights and privileges, and that they shall be made whole for any losses in salary they may have suffered because of the discrimination against them by the payment to them of backpay computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Heritage Hall, E.P.I. Corporation, Lawrence, Kentucky, their respective and its respective officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees who are LPNs that they are supervisors and unable to vote in the union election.

(b) Threatening employees with discharge and loss of employment because of their union activity of expression of union support.

(c) Creating the impression that the employees' union activities are under surveillance.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Prohibiting employees from distributing union literature in a nonwork area.

(e) Prohibiting an employee from entering the facility in retaliation for her union activity.

(f) Threatening employees with closure of the facility, loss of jobs, and with reprisals such as loss of benefits, loss of pay, loss of profit sharing, loss of holiday pay and vacations, and mandatory weekend work.

(g) Coercively interrogating employees about their union activity.

(h) Engaging in surveillance of employees and their union activities.

(i) Repeatedly instructing employees to issue disciplinary warnings because of their union activities.

(j) Informing an employee that she was discharged because she refused to engage in antiunion activities.

(k) Interrogating and polling its employees about their union sympathies.

(l) Discharging or suspending any employees because of their union support.

(m) Discharging employees because they refuse to engage in antiunion activities.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer Robin Ransdell and Barbara Gail Tyler full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Robin Ransdell, Barbara Gail Tyler, and Brenda Norman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, as set forth in the remedy section of this decision.

(c) Within 14 days from the date of this order, remove from its files any reference to employees' unlawful discharges and suspension and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Lawrenceburg, Kentucky facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."